

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NOLAN, Minors.

UNPUBLISHED
February 20, 2014

No. 315380
Macomb Circuit Court
Family Division
LC Nos. 2012-000263-NA
2012-000264-NA

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Respondent appeals as of right an order terminating his parental rights to his two sons (hereafter the children). The trial court found that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(b)(i), (g), (j), and (n)(i) and that termination was in the best interests of the children. We affirm.

Respondent first argues that termination of his parental rights was clearly erroneous because the issue was barred by the doctrine of res judicata. After petitioner removed termination language in an amended petition, respondent pleaded no contest to the amended petition and the court asserted jurisdiction over the children pursuant to MCL 712A.2(b). Respondent claims the no contest plea served as an adjudication on the merits thereby barring both the reinsertion of termination language in a subsequent amended petition and the termination proceeding that followed pursuant to MCL 712A.19. We disagree.

Whether res judicata applies is a question of law reviewed de novo on appeal. *Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013). The doctrine of res judicata seeks to avoid the relitigation of claims. *Matter of Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997). "In order for a prior judgment to operate as a bar to a subsequent proceeding, three requirements must be satisfied: (1) the subject matter of the second action must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits." *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). Res judicata does not apply because the subject matter of the second action (the termination proceeding) was not the same as that of the first action (assertion of the trial court's jurisdiction over the children). The court rules specifically allow the amendment of a petition during the course of a termination proceeding when circumstances are different from when the court took jurisdiction. MCR 3.977(F). The circumstances changed after respondent pleaded no contest because he was convicted of second-

degree criminal sexual conduct. The trial court did not err by proceeding with termination based on the petition amended after respondent's no contest plea.

Respondent next argues that there was not clear and convincing evidence to warrant termination of his parental rights. Specifically, respondent contends that sexual abuse of M.N., the children's half-sibling and respondent's former stepdaughter, who is female and biologically-unrelated to respondent, is not indicative of how he has behaved or will behave around his male and biologically-related children. Respondent argues he has not harmed the children and there is no evidence to suggest that he will harm them in the future. We disagree.

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19(b)(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). This Court reviews "for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *Id.* "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* The clear and convincing standard is the most demanding standard applied in civil cases. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

Again, the trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i) (parent caused sexual abuse and reasonable likelihood of future abuse), (g) (failure to provide proper care or custody), (j) (reasonable likelihood that child will be harmed), and (n)(i) (conviction of a listed offense and continuing the parent-child relationship would be harmful to the child).

MCL 712A.19b(3)(b)(i) provides, "The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home." The record supports the trial court's finding on this ground. Respondent was convicted of second-degree criminal sexual conduct because he sexually abused M.N. Under the doctrine of anticipatory neglect or abuse, how a parent treats one child is probative of how the parent may treat other children. *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009). This doctrine applies here even though respondent abused his stepdaughter and not a blood relative. See *In re Powers*, 208 Mich App 582, 592-593; 528 NW2d 799 (1995), superseded by statute on other grounds in MCL 712A.19b(3)(b)(i). The trial court found that respondent's reasons for abusing M.N. were unknown. Therefore, it could not safely predict that respondent would not similarly abuse children of a different gender, who were related by blood. Although respondent faced a term in jail and probation, if the children were ever returned to his home, there would be an ongoing threat to their safety. Respondent argues that he behaved appropriately and bonded with the children during supervised visits with them, but the court reasonably concluded that that evidence does not overcome the sexual abuse committed by respondent. Accordingly, MCL 712A.19b(3)(b)(i) was proven by clear and convincing evidence.

Because we have concluded that at least one ground for termination existed, we need not consider the additional grounds upon which the trial court based its decision. *In re HRC*, 286

Mich App at 461. Nevertheless, we have reviewed those grounds and conclude that termination was appropriate under MCL 712A.19b(3)(g), (j), and (n)(i).

Respondent next argues that the testimony of Daniel Surratt regarding the conditions of respondent's probation was inadmissible hearsay because Surratt neither had first-hand knowledge of those conditions, nor was present at respondent's sentencing. Surratt read the conditions from a copy of respondent's biographical information page on the Michigan Department of Corrections' online database, Offender Tracking Information System (OTIS). We agree with respondent's argument that the testimony was hearsay, but conclude that the error was harmless.

This Court reviews the evidentiary rulings of a trial court for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Generally, hearsay evidence is inadmissible at trial. MRE 802. Hearsay is defined as a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Surratt's testimony was hearsay because the OTIS page was an out of court statement, offered to prove the truth of the matter asserted, specifically that respondent's probationary conditions would prevent contact with the children once he is released from jail.

Petitioner claims the OTIS page was admissible under the exceptions in MRE 803(6) or (8). MRE 803(6) excepts from the hearsay rule records, reports, and other documentation of events or occurrences made at or near the time in the course of a regularly conducted business activity, made as a regular practice of that business activity. *People v Jambor*, 273 Mich App 477, 481-482; 729 NW2d 569 (2007). MRE 803(8) excepts from the hearsay rule "records or reports" setting forth the activities of a public office or agency. *Solomon v Shuell*, 435 Mich 104, 129-130; 457 NW2d 669 (1990). Both exceptions are based on the inherent trustworthiness of the records. *Solomon*, 435 Mich at 131; *Jambor*, 273 Mich App at 482. The Michigan Department of Corrections specifically states that OTIS may not be completely accurate or up-to-date, and should be independently verified. Therefore, the OTIS page Surratt referenced lacked the necessary guarantee of trustworthiness to be admissible under MRE 803(6) or (8) and was inadmissible.

MCR 2.613(A) provides, "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Even without information that the terms of respondent's probation would prohibit contact with the children for several years after his jail sentence, the untainted evidence of respondent's abuse of M.N. demonstrated an ongoing threat to the safety of the children whenever they returned to respondent's home, which was sufficient to terminate respondent's parental rights. Respondent has not been denied substantial justice. Accordingly, it was harmless error for the trial court to admit the OTIS page into evidence.

Last, respondent argues that termination of his parental rights is not in the best interests of the children because respondent is bonded to the children and he has proven that he can care for them. Further, respondent contends that he can provide for the children after he is released from jail. We disagree.

Once a trial court has found a statutory ground for termination of a parent's rights under MCL 712A.19b(3), the court must order termination of the parent's rights if the court finds by a preponderance of the evidence that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App at 83; see also MCR 3.972(C)(1). The trial court may consider a variety of factors in making the best interest determination, including the parent-child bond, the child's need for permanency and stability, and the relative advantages of a foster home over the parent's home. *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). We review for clear error the trial court's determination regarding the children's best interests. MCR 3.977(K).

The record supports the trial court's findings and conclusions that termination of respondent's rights was in the children's best interests. Respondent argues on appeal that he has bonded with the children and he possesses sufficient parenting ability to care for them. Respondent has only bonded with the children in the context of supervised visitation and, as petitioner argues on appeal, respondent's ability to perform basic parenting tasks, including feeding and diapering, does not outweigh the danger posed by respondent's abuse of the children's half-sister while she lived in his home.

The children's need for permanency, stability, and finality would be strongly served by termination of respondent's parental rights. Disregarding any hearsay evidence that respondent could not have contact with the children during his probation, it was not in the children's best interests to wait for respondent to complete his jail term to continue his care and custody or to share a home with a father who sexually abused their sibling. The children's foster parents, in contrast, had already demonstrated an ability to keep the children safe. The trial court's finding that termination of respondent's parental rights is in the children's best interests was not clearly erroneous and was supported by a preponderance of the evidence.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter